92-348

No. _____

In The

Supreme Court of the United States

October Term, 1992

BIBLE TEMPLE, OPEN DOOR BAPTIST CHURCH, GARDEN WAY CHURCH, COUNTRY CHURCH SCHOOL, COMMUNITY BIBLE CHURCH, ASSEMBLY OF GOD, CHRIST'S CENTER CHURCH, TILLAMOOK CHRISTIAN SCHOOL, INTERFAITH CHRISTIAN CENTER, FIRST ASSEMBLY OF GOD, CROSSROADS CHURCH OF CHRIST, NEWBERG OPEN BIBLE SCHOOL, BAKER VALLEY CHRISTIAN ASSEMBLY, and NEW LIFE CHRISTIAN ACADEMY,

Petitioners,

vs.

EMPLOYMENT DIVISION, STATE OF OREGON, Pamela A. Mattson, Administrator,

Respondent.

Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1.) Does the Establishment Clause of the First Amendment prohibit the State of Oregon from holding a church to be a subject "employer" under the Oregon Employment Division Law?

(2.) Does the Free Exercise Clause of the First Amendment prohibit the State of Oregon from holding a church to be a subject "employer" under the Oregon Employment Division Law?

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No. _____

In The

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October Term, 1992

BIBLE TEMPLE, OPEN DOOR BAPTIST CHURCH, GARDEN WAY CHURCH, COUNTRY CHURCH SCHOOL, COMMUNITY BIBLE CHURCH, ASSEMBLY OF GOD, CHRIST'S CENTER CHURCH, TILLAMOOK CHRISTIAN SCHOOL, INTERFAITH CHRISTIAN CENTER, FIRST ASSEMBLY OF GOD, CROSSROADS CHURCH OF CHRIST, NEWBERG OPEN BIBLE SCHOOL, BAKER VALLEY CHRISTIAN ASSEMBLY, and NEW LIFE CHRISTIAN ACADEMY,

Petitioners,

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EMPLOYMENT DIVISION, STATE OF OREGON, Pamela A. Mattson, Administrator,

Respondent.

Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioners, Bible Temple, *et al.*, pray that a writ of certiorari issue to review the judgment of the Oregon Court of Appeals filed in the above entitled proceeding on December 4, 1991, and entered July 22, 1992.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 110 Or. App. 148, 820 P.2d 468 (1991) and is reprinted in the appendix hereto. (App. 5).

The Referee Decisions of the Employment Division of the Oregon Department of Human Resources concerning Bible Temple and First Baptist Church of Scappoose, *et al.*, have not been reported. The Referee Decision for Bible Temple is reprinted at App. 21; the Referee Decision for First Baptist Church of Scappoose is reprinted at App. 32.

JURISDICTION

The judgement of the Oregon Court of Appeals was filed December 4, 1991. Its decision denying reconsideration was filed March 18, 1992.

By its order May 26, 1992, the Oregon Supreme Court denied Petitioners' Petition for Review of the decision of the Oregon Court of Appeals (App. 1), thereby making the judgment of the Oregon Court of Appeals a final judgment of the highest court of the the State of Oregon in which a decision could be had. Judgment was entered in the Court of Appeals on July 22, 1992.

The jurisdiction of this Court is invoked under 28 USC Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED -

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

U.S. Const. amend. XIV § 1

> . . . nor shall any state deprive any person of life, liberty or property, without due process of law; . . .

26 USC § 3309(b)(1)

> This section shall not apply to service performed – (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

ORS 657.072(1)(a)

> "Employment" does not include service performed:
>
> (a) In the employ of:
>
> (A) A church or convention or association of churches;
>
> (B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

ORS 657.030: (Text reproduced at App. 52).

ORS 657.176(1) and (2): (Text reproduced at App. 52).

ORS 657.471(1) and (7): (Text reproduced at App. 53).

ORS 657.663: (Text reproduced at App. 54).

ORS 657.530: (Text reproduced at App. 55).

ORS 657.660: (Text reproduced at App. 55).

Sec. 6, Chapter 897, Oregon Laws 1989: (Text reproduced at App. 57).

STATEMENT OF THE CASE

These fourteen petitioners are all Oregon churches, each of which operates as a part of its total religious ministries a Christian day school. Each of the churches is incorporated as a nonprofit, religious corporation under the laws of the State of Oregon. None of the Christian day schools operated by the petitioners are separately incorporated and none have separate payrolls or separate governments or administrations apart from their parent churches.

Each of the churches has staff working in its other ministries as well as in the school. Each staff member must have a "proven relationship with the Lord" and must be of the church's specific religious faith before he will be considered for hire. The primary purpose of each school ministry is to have a religious impact upon the student and to train the individual to view life from God's perspective. With this objective in mind, all courses are taught with a Biblical emphasis.

None of the petitioner churches have sought, nor would they accept, funds from the State of Oregon or any other governmental agency for the operation of their schools.

One of the Petitioners, Bible Temple, also operates as a part of its ministries the Bible Temple Bible College. The facts enumerated concerning the Christian day schools of these petitioners also hold true for Bible Temple Bible College.

In April 1985, the Employment Division of the Oregon Department of Human Resources (Employment Division) Issued a Notice of Determination to each petitioner, finding each to be an "employer" subject to Oregon's Employment Division Law, ORS Chapter 657. Petitioners each made timely written requests for administrative hearings upon these determinations. An administrative hearing was set for Bible Temple (Case No. 86-T-106) and one for the twenty-one following churches: First Baptist Church of Scappoose (Case No. 86-T-0131), South Lake Christian Center (Case No. 86-T-0103), Christian Assembly Church (Case No. 86-T-0079), Hood River Bible Fellowship (Case No. 86-T-0107), Open Door Baptist Church (Case No. 86-T-0110), Garden Way Church (Case No. 86-T-0109), Faith Christian Fellowship (Case No. 86-T-0095), Country Church School (Case No. 86-T-0152), Community Bible Church (Case No. 86-T-0100), Assembly of God (Case No. 86-T-0102), Christ's Center Church (Case No. 86-T-0080), Tillamook Christian School (Case No. 86-T-0159), Pendleton Baptist Church (Case No. 86-T-0096), McMinnville Christian School (Case No. 86-T-0151), Baptist Christian School (Case No. 86-T-0172), Interfaith Christian Center (Case No. 86-T-0148), First Assembly of

God (Case No. 86-T-0130), Crossroads Church of Christ (Case No. 86-T-0108), Newberg Open Bible School (Case No. 86-T-0150), Baker Valley Christian Assembly (Case No. 86-T-0094), and New Life Christian Academy (Case No. 86-T-0163). (Hereafter, First Baptist). The twenty-one churches agreed to wait until the Bible Temple case was heard before action was taken in their cases.

Bible Temple asserted at its administrative hearing that it should not be held to be a subject employer because, among other reasons, imposition of unemployment tax coverage would violate the Free Exercise Clause and the Establishment Clause protections of the First Amendment as applied to the states through the Fourteenth Amendment. After a hearing on the matter, the Employment Division Referee issued a decision in November 1987, ruling that, pursuant to ORS 657.072(1)(a)(A) and/or ORS 657.072(1)(a)(B), Bible Temple was not an employer subject to Employment Division Law. (App. 8).

The Employment Division petitioned the Oregon Court of Appeals for judicial review of the Referee decision. While that appeal was pending, the Oregon Supreme Court rendered its decision in *Employment Division v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P. 2d 588 (1989), wherein it invalidated 657.071(1)(a) on state constitutional grounds, holding that the statute impermissibly made an unequal grant of privilege between church-affiliated and non-church-affiliated religious organizations. In May 1990, the Oregon Court of Appeals reversed and remanded the Bible Temple case to the Employment Division Referee for reconsideration in light

of *Employment Division v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1990). (App. 20).

On August 21, 1990, a consolidated hearing was held for Bible Temple and First Baptist. Upon motion, one church, McMinnville First Church of the Nazarene, was permitted to withdraw its appeal. On October 16, 1990, the Employment Division Referee affirmed the Notices of Determination as to Bible Temple (App. 21) and as to First Baptist (App. 32), ruling that the petitioners were to be treated as reimbursing employers for services performed by their church school employees, were subject to Employment Division Law as of April 26, 1985, and were to be treated as reimbursing employers from that date.

Petitioners filed for judicial review of both decisions with the Oregon Court of Appeals, again asserting, among other things, that the imposition of the unemployment tax upon them violated the religion clauses of the First Amendment to the United States Constitution. Upon motion, the petitions were consolidated for judicial review. (App. 46). Also upon motion, the following petitioners were dismissed from the petition for judicial review: First Baptist Church of Scappoose, South Lake Christian Center, Christian Assembly, Hood River Bible Fellowship, Faith Christian Fellowship, Pendleton Baptist Church, and First Baptist Church of Hood River, operating as Baptist Christian School. (App. 49).

The Oregon Court of Appeals affirmed the referee decision (App. 5) and denied the petition for reconsideration (App. 3). On May 26, 1992, the Oregon Supreme Court denied review of the Court of Appeals decision. (App. 1).

As the record demonstrates, the petitioners discharge those employees who fail to adhere to the religious tenets of each of the petitioner churches. It is a matter of the personal religious beliefs of the congregation, as well as the governmental body of the church, that the church staff members are to consistently practice their religious faith. Subjecting them to the regulatory structure of the Employment Division Law would impose intrusive governmental oversight into the petitioners' ability to freely handle disputes or difficulties with its own staff that is crucial to the religious autonomy and identity of each.

ORS 657.176(1) and (2) and 657.471 (1) and (7) of the Employment Division Law (App. 52 and App. 53) permit, indeed they require, the Division to inquire into each employment separation in the church to determine whether the claiming individual has been "discharged for misconduct connected with work." It is left to the Division to determine whether termination was because of failure to comply with the religious tenets of the church and whether noncompliance with such religious standards is "misconduct" by the employee, which, under the Employment Division Law, will control whether the employee will receive benefits chargeable to the church. If the church or the employee disagrees with the Employment Division determination, court battles would almost certainly follow. (*See, e.g., St. Pius Parish Corporation v. Murray,* 557 A.2d 1214 (1989)).

If the petitioners are subject to the Employment Division Law, they must maintain extensive records of each of their staff members, many of whom will perform services in both the Christian day school as well as the church. The records are open to surveillance by the Employment

Division. Periodic reports must be generated by the subject employers and sent to the division (ORS 657.660 at App. 55), with penalties assessed if an employer fails to file required reports (ORS 657.663 at App. 54). The Employment Division has a lien upon the property of the petitioners to secure payment of the contributions due, a long with any interest and penalties. ORS 657.530 (App. 55).

REASONS FOR GRANTING WRIT

The Decision Below Involves an Important Question of Federal Constitutional Law Concerning a Cooperative Federal-State Program Not Yet Settled by This Court and Upon Which There is a Conflict Between the Highest Courts of Two or More States.

At issue in this case is the ORS 657.072(1)(a) exclusion from unemployment taxation coverage. That statute provides:

> (1) "Employment" does not include service performed:
>
> (a) In the employ of:
>
> (A) A church or convention or association of churches;
>
> (B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

The State of Oregon has departed substantially from the Federal Unemployment Tax scheme as it applies to religious organizations. In the first place, the Oregon Supreme Court has declared unconstitutional, under the Oregon Constitution, ORS § 657.072(1)(a)(A), the Oregon Unemployment Insurance provision which would permit church-related schools to be excluded from coverage. *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471, 695 P.2d 25 (1985). This is despite the fact that this Court has specifically held that church-related schools are excluded under the Federal Unemployment Compensation Act provisions which the Oregon Act was intended to mirror. ORS 657.030 and *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981). Next, the Oregon Supreme Court invalidated under the Oregon Constitution the entire section (1)(a) of 657.072 exclusion for churches or religious organizations operated, supervised or controlled by a church. *Employment Division v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1989). According to the Oregon Supreme Court, ORS 657.072(1) violates Art. I, § 20 of the Oregon Constitution, since it purports to exclude churches and religious organizations related to churches, but does not exclude non-church-related organizations. Therefore, says the Supreme Court, the entire provision must be struck down and no exclusions given to any religious organization.

A brief chronology of the Federal Unemployment Compensation Act (FUTA) is necessary for an understanding of the present dilemma. The FUTA was passed during the Depression era to provide benefits for the many unemployed. From 1960 to 1970, FUTA expressly excluded from the definition of "employment" all service

performed for a 501(c)(3) organization. 26 USC 3306(8). In 1970, that broad exemption was narrowed.

> The amendment generally required state coverage of employees of nonprofit organizations, state hospitals, and institutions of higher education. Simultaneously, however, Congress enacted a new and narrower exemption of nonprofit organizations and governmental entities. So far as is pertinent to this case, that exemption was set forth in a new § 3309(b).

St. Martin, 451 U.S. at 776-777. The new §3309(b)(1) excluded from coverage services performed in the employ of churches or church-controlled religious organizations whose primary purpose was religious – the identical exclusions that presently exist. It also added an exclusion at §3309(b)(3) for services "in the employ of a school which is not an institution of higher education."

In 1976, further amendment to FUTA eliminated subsection (b)(3) and left (b)(1) unchanged. As did most states, the Oregon Legislature immediately amended its mirror statute to also eliminate the subsection which excluded coverage for elementary and secondary schools, leaving intact the exclusion for churches and church-run religious organizations. The question immediately arose as to whether and which religious schools continued to be excluded from coverage, generating a number of cases in state courts.

In 1978, the United States Secretary of Labor issued a letter ruling that the 1976 amendment intended to include in coverage church-related schools and that §3309(b)(1) was not applicable to church-run schools. *St. Martin*, 451 U.S. at 777-778. The cases still did not go away, with

churches and religious organizations raising statutory and constitutional challenges to the states' subjecting them to the unemployment insurance tax.

In 1981, this Court settled at least part of the statutory question in the *St. Martin* case. The Court had before it the construction of the South Dakota statute which complemented 26 USC §3309(b)(1)(A) as it applied to two church-operated elementary and secondary schools. Both claimed exemptions under South Dakota's statute which complements 26 USC §3309(b)(1)(A). The South Dakota's Unemployment Insurance Division had ruled that service performed in both of these institutions was covered by the act. The St. Martin Evangelical Lutheran Church and the Northwestern Lutheran Academy both appealed, claiming an exemption either under the statute or by way of the Free Exercise Clause and the Establishment Clause of the First Amendment. This Court ruled that church-run religious schools are excluded from coverage under FUTA, and indicated in a footnote that schools which are separate corporations formed by a church or association of churches would also be exempt. There was thus no need for the Court to decide the First Amendment claims for exemptions which had been raised.

The next term this Court was again presented with the question of the constitutionality of imposing an unemployment tax upon churches and religious schools in *California v. Grace Brethren Church,* 457 U.S. 393 (1982). This time it was asked to decide whether the California statute which complements the FUTA violated the Establishment and Free Exercise Clauses as to three categories of employers: schools that are part of the corporate structure of a church or association of churches; schools that

are separate corporations formed by a church or association of churches; and independent, non-church affiliated religious schools.

In 1979, before *St. Martin,* the District Court had granted a preliminary injunction against the State of California, restraining it from the collection of the taxes from the churches which operated schools as a part of their own corporate structures and schools that were separately incorporated by churches. The basis for the injunction was the District Court's conclusion that the church-schools were excluded under §3309(b)(1), "and alternatively, that if they were not exempt under the terms of FUTA, collection of the tax from the plaintiffs would involve excessive governmental entanglement with religion, in violation of the Establishment Clause of the First Amendment." *Grace Brethren,* 457 U.S. at 399. Indeed, said the District Court in its order granting the injunction, a

> state suit for a refund was an inadequate remedy because the plaintiff claimed not only that their property had been taken unlawfully, but also that the 'very process of determining whether any tax is due at all results in a violation of their First Amendment rights.' " *Id.*, at 400.

For this preliminary injunction the District Court also concluded that the third category of schools – independent, non-church affiliated religious schools – were not statutorily exempt and were not at sufficient risk of excessive governmental entanglement to violate the Establishment Clause.

Finally, in 1981, the District Court, ruling on the motions for permanent injunctions, concluded that the first two categories of schools were exempt from coverage under 26 USC §3309(b) and the corresponding state provision. While the independent, non-church-affiliated schools were not statutorily exempt, the District Court held that " 'constitutional considerations bar the application of the scheme' " to these schools. *Id.*, at 403.

Following the District Court's injunction in *Grace Brethren*, this Court decided *St. Martin*. As a result of the *St. Martin* opinion, the Secretary of Labor appealed that part of the District Court's order involving the independent religious schools. This Court vacated and remanded the District Court order for lack of federal court jurisdiction. Thus, the constitutionality under the religion clauses of the inclusion of religious schools in the unemployment compensation scheme remains open for determination.

Grace Brethren was the last time the question of whether and what religious organizations were excluded from FUTA and corresponding state schemes, either by statute or through constitutional protections, has been before this Court. Meanwhile, the states have struggled with the issue.

Oregon, for instance, first held that services performed in the schools of the Archdiocese of Portland were excluded from coverage under ORS 657.072(1)(a). *Employment Division v. Archdiocese of Portland*, 42 Or. App. 421, 600 P.2d 929 (1979). Then in 1991, the same court, following two other state cases concerning the issue, affirmed a Referee determination holding the Archdiocese to be subject employers. *Archdiocese of Portland v.*

Employment Division, 108 Or. App. 495, 814 P.2d 566 (1991). The Archdiocese of Portland petitioned this Court for certiorari on February 24, 1992. (*Archdiocese of Portland in Oregon v. Oregon Employment Division*, 60 U.S.L.W. 3701 (U.S. April 14, 1992)). The petition, docketed as No. 91-1554, has been carried over to the 1992-1993 term, on the issue of the constitutionality of unemployment compensation coverage under the Establishment Clause. (*Archdiocese of Portland in Oregon v. Oregon Employment Division*, 61 U.S.L.W. 3014 (U.S. July 21, 1992)).

The reversal of position by the same state about the same religious organization on the same statute came about because of *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471, 695 P.2d 25 (1985) and *Employment Division v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1989). In 1985, in *Salem College*, the Oregon Supreme Court held that under the Oregon Constitution, the distinction between schools operated by church-affiliated and independent religious schools created by ORS 657.072(1), Oregon's statute which mirrored §3309(b)(1), violated Or. Const. Art. I, §20 as an unequal grant of privilege among religious organizations. The Oregon Supreme Court, rather than severing the unconstitutional church affiliation requirement of ORS 657.072(1), interpreted Oregon's statute as not excluding from covered employment services performed in any religious school, church-affiliated or not.

Three years later, the Court in *Rogue Valley* broadened that decision to hold that the distinction between any religious organizations based upon their relationship to a church was unconstitutional. Therefore, for the first time in Oregon, services performed in the employ of a

church were covered under the Employment Division Law. None of these Oregon cases have reached the federal constitutional issues raised in the cases.

Other states have also wrestled with the issues, disposing of them in a variety of ways, ranging from state constitutional decisions, as in Oregon, to strained constructions of the state statutes.

Christian School Association of Greater Harrisburg v. Commw. Department of Labor, 55 Pa. Commw. 555, 423 A.2d 1340 (1980) involved five consolidated appeals brought by private religious schools which had been determined by the Pennsylvania Department of Labor and Industry to be subject to the provisions of the Unemployment Compensation Law. The five schools claimed that they were either exempt under the church-affiliated organizations provision of the state law or that their inclusion in the scheme violated their right to the free exercise of religion.

The Commonwealth Court found that imposition of the Unemployment Compensation Law's requirements would present substantial risk of infringement upon the schools' First Amendment rights, particularly in the areas of required participation in "good cause" eligibility hearings for their former employees; increased and detailed record keeping, and added financial burden. Nevertheless, the Pennsylvania court also held that the distinction between church-sponsored and independent religious organizations was constitutionally infirm. Rather than striking the exemption for all religious organizations, as Oregon did, the Pennsylvania court severed the infirm

portion, and upheld the exemption for all schools operated primarily for religious purposes. *Christian School Association*, 423 A.2d 1344-1345, 1347.

In *Grace Lutheran Church v. North Dakota Employment Security Bureau*, 294 N.W.2d 767 (1980), the North Dakota Supreme Court held that service performed for the school which was owned and operated by the Church were exempt from coverage under the state statute that mirrored 26 USC §3309(b)(1)(A) "church or convention or association of churches" provision. Despite the fact that the North Dakota Supreme Court concluded that the church was entitled to exclusion under the statute, because of public interest and judicial economy, it nevertheless discussed the constitutional claims which had been raised. Under its analysis, the court concluded that "the end result of including church schools in unemployment compensation legislation raises serious questions as to excessive governmental entanglement with religion." *Grace Lutheran*, 294 N.W.2d at 774.

In *Koolau Baptist Church v. Hawaii Department of Labor and Industrial Relations*, 68 Haw. 410, 718 P.2d 267 (1986), the Hawaii Supreme Court reversed a trial court decision which had held that the application of the Hawaii Employment Security Law to lay teachers at a church school violated the First Amendment.

Finally, the State of Idaho strained to find that an independent religious school was "supported" by the moral support of several churches so as to fall within the "principally supported" exemption of the state statute. *Nampa Christian Schools Foundation, Inc. v. Idaho Department of Employment*, 719 P.2d 1178 (1986).

As is evident from the range of these cases, the state courts, and at least one federal district court, have been troubled about the issue of the constitutionality of including in coverage services performed for all kinds of parochial schools. Lacking this Court's guidance as to the constitutionality under the religious clauses of the United States Constitution of including religious schools in the unemployment compensation statutory scheme, their solutions to the cases before them have resulted in a wide range of federal constitutional protections available to organizations which are operated primarily for religious purposes. In short, the federal protection intended for religion in the First Amendment has become provincial in nature as it relates to this "cooperative federal-state scheme," *Grace Brethern*, 457 U.S. at 396. If these petitioners moved to North Dakota, or perhaps Pennsylvania, they would enjoy the protection of the First Amendment that they have not received in Oregon.

The State of Oregon desires to continue to exempt religious organizations, if it can do so and not jeopardize its compliance with FUTA. The Legislature's amendment of 657.072 in Sec. 6, Chapter 897, Oregon Laws 1989 (App. 57) made that clear when it made the amendment excluding from coverage all organizations operated primarily for religious purposes effective only when "amendments to the Federal Unemployment Tax Act (26 U.S.C. §3301 et seq.) become operative that permit states to exempt all religious organizations without jeopardizing the right of employers in this state to a full tax credit against the tax imposed by the Federal Unemployment Tax Act." Direction from this Court on the constitutionality of exempting all religious organizations from FUTA will greatly assist

the State of Oregon, these petitioners and other states and churches throughout the nation.

The construction of the cooperative federal-state scheme is important, and has been so since its origination in 1935. Also of grave importance are the petitioners' right to freedom of religion as embodied in the First Amendment two hundred years ago. This Court's direction is desperately needed to restore uniformity in the enforcement of FUTA and the states' mirror statutes.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT
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BIBLE TEMPLE)
Petitioner/Petitioner)
FIRST BAPTIST CHURCH)
SCAPPOSSE [SIC])
Petitioner)
SOUTH LAKE CHRISTIAN CENTER)
Petitioner)
CHRISTIAN ASSEMBLY CHURCH)
Petitioner)
HOOD RIVER BIBLE FELLOWSHIP)
Petitioner)
OPEN DOOR BAPTIST CHURCH)
Petitioner/Petitioner)
GARDEN WAY CHURCH)
Petitioner/Petitioner)
FAITH CHRISTIAN FELLOWSHIP)
Petitioner)
COUNTRY CHURCH SCHOOL)
Petitioner/Petitioner)
COMMUNITY BIBLE CHURCH)
Petitioner/Petitioner)
ASSEMBLY OF GOD)
Petitioner/Petitioner)
CHRIST'S CENTER CHURCH)
Petitioner/Petitioner)
TILLAMOOK CHRISTIAN SCHOOL)
Petitioner/Petitioner)
PENDLETON BAPTIST CHURCH)
Petitioner)
BAPTIST CHRISTIAN SCHOOL)
Petitioner)
INTERFAITH CHRISTIAN CENTER)
Petitioner/Petitioner)

FIRST ASSEMBLY OF GOD Petitioner/Petitioner CROSSROADS CHURCH OF CHRIST Petitioner/Petitioner NEWBERG OPEN BIBLE SCHOOL Petitioner/Petitioner BAKER VALLEY CHRISTIAN ASSEMB Petitioner/Petitioner NEW LIFE CHRISTIAN ACADEMY Petitioner/Petitioner v. EMPLOYMENT DIVISION Respondent/Respondent	)	ORDER DENYING REVIEW CA A67126 SC S38900

The Court has considered the petition for review and orders that it be denied.

DATE: May 26, 1992.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

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ROBERT M ATKINSON	Attorney for Respondent/Respondent

IN THE SUPREME COURT
OF THE STATE OF OREGON

BIBLE TEMPLE)
Petitioner)
FIRST BAPTIST CHURCH)
SCAPPOSSE [SIC])
Petitioner)
SOUTH LAKE CHRISTIAN CENTER)
Petitioner)
CHRISTIAN ASSEMBLY CHURCH)
Petitioner)
HOOD RIVER BIBLE FELLOWSHIP)
Petitioner)
OPEN DOOR BAPTIST CHURCH)
Petitioner)
GARDEN WAY CHURCH)
Petitioner)
FAITH CHRISTIAN FELLOWSHIP)
Petitioner)
COUNTRY CHURCH SCHOOL)
Petitioner)
COMMUNITY BIBLE CHURCH)
Petitioner)
ASSEMBLY OF GOD)
Petitioner)
CHRIST'S CENTER CHURCH)
Petitioner)
TILLAMOOK CHRISTIAN SCHOOL)
Petitioner)
PENDLETON BAPTIST CHURCH)
Petitioner)
BAPTIST CHRISTIAN SCHOOL)
Petitioner)
INTERFAITH CHRISTIAN CENTER)
Petitioner)

FIRST ASSEMBLY OF GOD Petitioner CROSSROADS CHURCH OF CHRIST Petitioner NEWBERG OPEN BIBLE SCHOOL Petitioner BAKER VALLEY CHRISTIAN ASSEMB Petitioner NEW LIFE CHRISTIAN ACADEMY Petitioner v. EMPLOYMENT DIV Respondent	)	ORDER DENYING RECON-SIDERATION CA A67126 SC S38900

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has on March 18, 1992, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The Appellate Court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

s/GEORGE M. JOSEPH
CHIEF JUDGE

COPIES TO:

KELLY E FORD	Attorney for Petitioner
ROBERT M ATKINSON	Attorney for Respondent
CHARLES E CRAZE	Attorney for Petitioner
CHARLOTTE A COVER	Attorney for Petitioner

FILED: December 4, 1991

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

In the Matter of a Notice of
Determination of Bible Temple.

BIBLE TEMPLE,

Petitioner,

v.

EMPLOYMENT DIVISION,

Respondent.

In the Matter of Notices of
Determination of First Baptist Church
of Scappoose, South Lake Christian
Center, Christian Assembly Church,
Hood River Bible Fellowship, Open
Door Baptist Church, Garden Way
Church, Faith Christian Fellowship,
Country Church School, Community
Bible Church, Assembly of God,
Christ's Center Church, Tillamook
Christian School, Pendleton Baptist
Church, Baptist Christian School,
Interfaith Christian Center, First
Assembly of God, Crossroads Church
of Christ, Newberg Open Bible School,
Baker Valley Christian Assembly and
New Life Christian Academy.

OPEN DOOR BAPTIST CHURCH, GARDEN WAY CHURCH, COUNTRY CHURCH SCHOOL, COMMUNITY BIBLE CHURCH, ASSEMBLY OF GOD, CHRIST'S CENTER CHURCH, TILLAMOOK CHRISTIAN SCHOOL, INTERFAITH CHRISTIAN CENTER, FIRST ASSEMBLY OF GOD, CROSSROADS CHURCH OF CHRIST, NEWBERG OPEN BIBLE SCHOOL, BAKER VALLEY CHRISTIAN ASSEMBLY and NEW LIFE CHRISTIAN ACADEMY,

Petitioners,

v.

EMPLOYMENT DIVISION,

Respondent.

(86-T-01068, 86-T-0110, 86-T-0109, 86-T-0152, 86-T-0100, 86-T-0102, 86-T-0080, 86-T-0159, 86-T-0148, 86-T-0130, 86-T-0108, 86-T-0150, 86-T-0094; CA A67126 (Control), A67-130)
(Cases Consolidated)

Judicial Review from Employment Division Referee.

Argued and submitted October 31, 1991.

Charles E. Craze, Menlo Park, California, argued the cause for petitioners. With him on the brief were Robin S. Hom, Charlotte A. Cover and Gibbs & Craze Co., L.P.A., Menlo Park, California, and Kelly E. Ford, Beaverton.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer,

Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Buttler, Presiding Judge, and Rossman and De Muniz, Judges.

PER CURIAM

Affirmed. *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989); *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 487 n 12, 695 P2d 25 (1985); *Archdiocese of Portland v. Employment Division*, 108 Or App 495, 814 P2d 566 (1991).

Employment Division
Hearings Section
875 Union Street NE
Salem, OR 97311

Date Mailed: 11-25-87
Final Appeal Date: 12-15-87
Case No.: 86-T-106
Firm No.: 365864

REFEREE DECISION

BIBLE TEMPLE
7600 NE GLISAN ST.
PORTLAND, OR 97213

A Notice of Determination, issued by an authorized representative of the Assistant Director of the Employment Division, was served on the above-named applicant on April 16, 1986, under the provisions of ORS 657.485, 657.679 and 657.683(1). The applicant requested a hearing on May 7, 1986.

Note: A referee decision mailed August 20, 1986, in Case No. 86-T-102 [Assembly of God and 12 others – including applicant] found good cause for the one day late filing of the request.

A Notice of Employer's Tax Rate issued by an authorized representative of the Assistant Director of the Employment Division for the calendar year 1987 was served under ORS 657.485. Applicant field a timely request for a review and redetermination of the tax rate. On December 12, 1986, a decision of the authorized representative of the assistant director for the Employment Division was served under the provisions of ORS 657.485(3). The decision found: "We have reviewed the information from

which the rate was based and find the rate determination is correct according to our records." The applicant filed a request for hearing on December 23, 1986.

A hearing was held before the undersigned referee of the Employment Division on June 15 and 16, 1987, in Portland, Oregon. Participating were Charles E. Craze, Robin S. Hom, and Kelly Clark, attorneys, all for applicant; and Renee Bryant Mason, Assistant Attorney General representing the Employment Division.

Pursuant to leave requested of the referee, applicant's trial brief, hearing memorandum and reply memorandum of the Employment Division, and applicant's reply brief were filed August 3, 1987, July 30, 1987, August 31, 1987, and August 31, 1987, respectively.

ISSUE AND LAW: (A) Whether the applicant is an "employer" as defined under ORS 657.025.

(B) Whether the employer's tax rate for 1987 has been correctly computed under ORS 657.462 (Note: pursuant to stipulation entered July 16 and 17, 1987, the parties agreed: " * * * for purposes of this case only, the tax rate assigned by the Division to Bible Temple is correct, but only insofar as Bible Temple is first determined a subject employer and a final decision on that issue is rendered.".)

Referee's Findings of Fact: (1) Bible Temple Church was incorporated as a non-profit (religious) corporation under the laws of Oregon in 1959. (2) It has received recognition of tax exempt status under section 501(c)(3) of the United States Internal Revenue code and is exempt from income tax under section 501(1) of the Internal Revenue code. (3) Applicant's purpose, as evidenced by Article 11 of the

Articles of Amendment to the Articles of Incorporation to Bible Temple (Exhibit 8) is: " * * * to preach the gospel, to propagate missionary endeavor, to establish churches, to send missionaries to home and foreign fields; to establish Bible and training schools and colleges, to grant and decree upon students certificates and diplomas in accordance with accreditation standards * * * ". (4) Applicant's church ministries, among others, include Bible Temple Christian School and Bible College. (5) The Christian School ministry was started in 1974 as a part of, and has remained an integral part of, the Church. (6) The School is not separately incorporated and it does not have a separate government or administration apart from the Church. (7) The elders of the Church serve as the governing body of the Church, including the School. (8) All assets and property used by the School are owned by the Church and are managed and controlled by the elders of the Church. (9) There is no separate School bank account, all transactions are handled through the Church's checking account. (10) The Bible Temple Christian School has no separate payroll, no recognizable or identifiable membership and no legal existence apart from the Church. (11) Classes for the School (kindergarten through grades 1-12) are held on Church property, such as, in the sanctuary and a gymnasium. (12) The Bible College with its dormitory is situated separately on Rocky Butte in Portland, Oregon. (13) For the school year 1986-87, there were a total of 305 students in attendance. (14) Twelve individuals are employed as teachers; 20 part-time aides; two full time secretaries, one assistant secretary, one assistant to the principal, and the principal. (15) The church

furnishes janitorial services. (16) The Bible College with 180 students can, to a certain extent, be considered as a seminary as the graduates of such are qualified for full time ministerial services. (17) Applicant considers itself to be a non-denominational Christian espoused religion with Biblical emphasis on all of its teachings. (18) Although staff members of the School are hired in the usual manner for educational employes, they must have had a "proven relationship with the Lord". (19) They are expected to live up to Christian standards 24-hours a day. (20) There are no written contracts entered into between applicant and staff members. (21) Nor are there any published guidelines, as the individuals are expected to comply with all doctrines of the Church and admonitions of the Bible. (22) Applicant's budget for the 1986-87 school year was $500,000. (23) Tuition charges are $1,600 for the first student, increased to $2,800 for up to four students in the same family. (24) The general fund of the Church supports the school and because there is no charge for the use of its physical facilities by the school its contribution would exceed 50 percent if a charge for rent was taken into consideration. (25) Applicant has not sought and would not accept funds from the State of Oregon or any other governmental agency for the operation of its school. (26) Applicant is not registered with the State of Oregon as an educational institution. (27) The primary purpose of Bible Temple Christian School is to have a religious impact on the student, and to train the individual to see life from God's perspective.

Conclusion and Reasons: (A) Applicant is not an "employer" as defined in ORS 657.025.

An "employer" as defined in ORS 657.025 means: "any employing unit which employs one or more individuals in an employment subject to this chapter in each of 18 separate weeks during any calendar year, or in which its total payroll during any calendar quarter amounts to $225 or more."

As found herein, applicant employed one or more individuals in its school in each of 18 separate weeks and its total payroll during the second calendar quarter of 1985 amounted to $225 or more. Therefore, applicant is an "employer" within the meaning of the Employment Division Law, as of April 26, 1985, unless the services of the individuals performed therefor are to be exempt therefrom under one of the exclusionary provisions thereof.

Applicant relies upon ORS 657.072(1)(a)(A) for such exemption.

ORS 657.072(1)(a) states: " 'Employment' does not include service performed: (a) In the employ of: (A) A church or convention or association of churches; (B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches * * * ".

The Employment Division contends that the statute [ORS 657.072(1)(a)] has been held to be unconstitutional by the Oregon Supreme Court in the case of *Salem College and Academy v. Employment Div.*, 298 Or 471, 695 P2d 25 (1985), and is, therefore, no longer effective.

As shown by applicant's Constitution and Articles, applicant's stated purpose, among other things, is "to establish

Bible and training schools and colleges". That applicant's school was created and has been "operated primarily for religious purposes" has not been questioned. As shown herein, it is part and parcel of the Bible Temple Church the same as Bible Temple Sunday School, or any of the other ministries supported by the Church. The inescapable conclusion is that subjecting the services of the Bible Temple Christian School staff to the Employment Division Law would be akin to subjecting the Bible Temple Church, itself, to the law.

Although without more, a school is not a church, yet a church is, among other things, an institution of instruction. As shown repeatedly throughout the record in this matter, applicant's school is so intertwined with applicant's corporate operating and management structure as to be an indivisible and inseparable part thereof. Clearly, Bible Temple is a church within the meaning of ORS 657.072(1)(A) and OAR Chapter 471-31-090(1)(a), and it cannot be found that Bible Temple Christian School is any the less. Unlike some church sponsored endeavors, services performed for a school are not in the furtherance of a trade or business or for profit for the school or applicant. Any such business endeavor would, of course, to the extent thereof subject applicant to the requirements of the Employment Division Law.

Even if applicant's school were not considered a part of applicant's corporate structure as not coming within the meaning of the word "church", there is no doubt but what an exemption from the Employment Division Law would still be afforded Bible Temple under the provisions of (1)(a)(B) of ORS 657.072. Although applicant, in its skillful and thoroughly prepared briefs, has not invoked

the exclusion, there is no doubt but what applicant's school is operated primarily for religious purposes and, coupled with the indisputable fact that it is not only "operated, supervised, (or) controlled" by Bible Temple, but that it is also "principally supported by * * * (the) Church", it would come within the meaning of the exclusion. If one is inclined to disagree with the conclusion that applicant's school is "operated primarily for religious purposes", one need only to recall the testimony of plaintiff's witnesses, who affirmed that applicant "strongly believes and practices the fact that their teaching must be totally religious and taught from a Bible-based Christian perspective * * * and every action, program, lesson, policy or activity has a scriptural basis, function and purpose".

As indicated herein, the Employment Division has taken the position that the Oregon Supreme Court has declared (*Salem College*) that religious schools must be covered by the Employment Division law. It goes so far as to include all schools, whether religious or not, even if operated and supported by a church. The Division's position is succinctly stated in its hearings memorandum filed July 31, 1987: "Contrary to Applicant's contention that *Salem College and Academy* does not mandate coverage of church employes, to the extent that any person is employed by a church operated school, that is *precisely* what was mandated by the case. The court held that ORS 657.072 *does not* exempt all religious schools and their employes from coverage, i.e., all religious schools and their employes *are* subject to taxation under Employment Division law. Distinguishing among religious schools because they are part of a church would violate the Oregon Constitution.

The Employment Division has no alternative but to impose taxes on *all* religious schools."

Salem College & Academy, Inc., was a case that grew out of a tax assessment against the Academy. The Academy requested a hearing on the assessment, claiming that it was exempt from reimbursement for Unemployment Insurance benefits under ORS 657.072(1) or that the statute was unconstitutional. A referee decision found the Academy was not exempt under the statute and affirmed the assessment. On appeal, the Oregon Court of Appeals found the statute infringed on the constitutional establishment of religion clause and reversed the referee's decision. *Salem College & Academy, Inc. v. Emp. Div.*, 61 Or App 616, 659 P2d 415 (1983). On review, the Oregon Supreme Court reversed the Court of Appeals and reinstated the Employment Division's decision, but also finding the statute to be unconstitutional.

Although Salem Academy contended it was excluded from the provisions of the Employment Division Law as coming within the exclusion of ORS 657.072(1)(a)(B), the referee decision found otherwise. Although it was agreed that the Academy comes within that part of the statutory requirement that it was: "An organization which is operated primarily for religious purposes", it could not be found that it was also "operated, supervised, controlled or principally supported by a church or convention or association of churches".

Clearly, Salem Academy was not a church, nor was it operated or supported by a church. It was not associated with a church as applicant Bible Temple Christian School has been found to be. As shown by applicant, *Salem*

Academy, as decided by the Oregon Supreme Court, is not the same as nor controlling in the case of applicant's exclusion from the Employment Division Law. Although the Supreme Court found the statute to be unconstitutional a position originally argued by *Salem Academy*, yet it upheld the referee decision that found the Academy not to come within the requirements of the statute.

As suggested in *Salem Academy:*

> "The present case would avoid constitutional difficulties if [the school] qualified for exemption as a church or as 'principally supported' by one or more churches. If ORS 657.072(1)(a) could be so interpreted and applied, it should be. Statutes should be interpreted and administered to be consistent with constitutional standards before attributing a policy of doubtful constitutionality to the political policymakers, unless their expressed intentions leave no room for doubt." 298 Or at 481. (Citations omitted.)

Thus, in the case of Bible Temple it is seen that the court's requisite for the interpretation of the statute and application of the exclusion is present.

Salem Academy did not consider the constitutional protections to be afforded a church, such as applicant, which has doctrinal objections to being made subject to the Employment Division Law. The instant matter involves the express intention of the Legislature to exclude churches and a long standing practice of honoring that exemption even for church employes who work therein and in organizations operated primarily for religious purposes. Church employes are not to be treated like public

school employes. The statute clearly provides several alternative exemptions by the very nature of its disjunctive language. The first exemption, which is disjoined from the second exemption, provides that " 'Employment' does not include service performed; (a) In the employ of: (A) A church or convention or association of churches". Thus, from the clear unambiguous statutory language it is seen that service performed in the employ of a church, regardless of the nature of such service, constitutes exempt employment. Had it been intended that such service must also be primarily religious in nature, such additional restriction would have been included. It is uncontroverted that Bible Temple Christian School ministry is an integral and inseparable arm of the Church. Staffing is provided from within the church and through its membership. The elders of the Church serve as the governing body of the Church, including the school. The convincing, substantial and only evidence establishes that the contract of employment between the teaching staff exists only between the Church and anyone and, therefore, cannot discharge anyone employed by the church to render services as a teacher or otherwise. The statute designating those types of employment relationships that are not subject to coverage in the instant matter clearly exempts the employment relationships of the staff members of Bible Temple Christian School.

It is concluded from the record in this matter that services performed for applicant by its employes come within the exclusions of ORS 657.072(1)(a)(A) as being for "a church" and/or ORS 657.072(1)(a)(B) as being for "An organization which is operated primarily for religious purposes and which is operated, supervised, controlled

or principally supported by a church", and that such services are not subject to the Employment Division Law. There is, of course, no question but what applicant is a "nonprofit employing unit", as qualified by subsection (2) of ORS 657.072 and that it is exempt from income tax under section 501(a) of the U.S. Internal Revenue Code. Therefore, applicant is not to be considered an employer within the meaning of nor subject to Employment Division Law on or after April 26, 1985.

(B) Whether applicant's tax rate for 1987 has been correctly computed under ORS 657.462 is moot in view of the non-subjectivity of services rendered.

DECISION

The determination, notice of which was served April 16, 1986, is set aside.

/s/ Glen E. Seidler
GLEN E. SEIDLER
Referee

GES:ghc

NOTICE: The foregoing is a final order or a decision of the referee. It is subject to the right of an aggrieved party to file a petition within 20 days with the Court of Appeals, State of Oregon, for judicial review under the Administrative Procedure Act. *See* ORS 657.684 and ORS Chapter 183 (183.310 to 183.500).

In the event this decision is appealed to the Oregon Court of Appeals, a copy of petition should be mailed to *G. Clark, Hearing Section, Employment Division, 875 Union NE,*

Salem, Oregon 97311, as a means of expediting the preparation of the transcript.

101 Or.App.497, 790 P.2d 561)

In the Matter of the Tax Deficiency Assessment of Bible Temple.

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES, Pamela Mattson, Administrator of Employment Division, Petitioner,

v.

BIBLE TEMPLE, Respondent.

86-T-106; CA A46818.

Court of Appeals of Oregon.

Argued and Submitted March 26, 1990.
Decided May 2, 1990.

Judicial Review from Employment Division.

Robert M. Atkinson, Asst. Atty. Gen., Salem, argued the cause for petitioner. With him on the brief were Dave Frohnmayer, Atty. Gen., and Virginia L. Linder, Sol. Gen., Salem.

Kelly Clark, Portland, argued the cause for respondent. With him on the brief were Bouneff, Chally & Marshall, Portland, Charles E. Craze and Gibbs & Craze, Burlingame, Cal., and Robin S. Hom, San Leandro, Cal.

Before RICHARDSON, P.J., and NEWMAN and DEITS, JJ.

PER CURIAM.

Reversed and remanded for reconsideration. Rogue Valley Youth for Christ v. Employment Division, 307 Or. 490, 770 P.2d 588 (1989); see also Emp. Div. v. Archdiocese of Portland, 101 Or.App. 498, 790 P.2d 561 (1990), Or.App., 1990.

Employment Division
Hearings Section
875 Union Street NE
Salem, OR 97311

Date Mailed: 10-16-90

Final Appeal Date: 11-05-90

Case No.: 86-T-0106B

Firm No.: 365864

REFEREE DECISION

BIBLE TEMPLE

7600 NE GLISAN ST.

PORTLAND, OR 97213

A Notice of Determination was issued to the applicant establishing that the applicant was an employer subject to Employment Division Law as of April 26, 1985. The applicant filed a timely request for a hearing.

A referee decision was issued in this matter on November 25, 1987. The referee ruled that the applicant was not an employer subject to Employment Division Law ORS 657.072(1)(a). The referee decision was appealed to the Court of Appeals. On May 2, 1990, the Oregon Court of Appeals reversed and remanded the matter for reconsideration in light of *Employment Division v. Rogue Valley Youth for Christ*, 307 Or 490, 770 P2d 588 (1989).

A hearing was conducted by the undersigned referee on August 21, 1990, concerning 21 other applicants whose cases are similar to that of Bible Temple. Those applicants were represented by Charles E. Craze and Kelly Clark,

attorneys, the same individuals who represent the applicant in this matter. M. Harbur, Assistant Attorney General, represented the Employment Division.

It was agreed at the hearing that the referee would review all of the testimony, arguments and briefs submitted concerning the Bible Temple case.

On September 5, 1990, the referee mailed out a letter to all parties to the Bible Temple case noting that he had all of the pertinent documents pertaining to the matter. He would take all of this material into consideration, as well as the arguments presented on the record at the August 21, 1990, hearing, and then rule on the Bible Temple matter. The parties were given 10 days to request an opportunity to present further evidence or arguments specifically pertaining to the Bible Temple matter. The 10-day period has passed and no response has been received. Therefore, a decision will be issued in the Bible Temple case.

To ensure all parties know what documents are part of this record, the following exhibits are received and entered into the record:

(a) Exhibit 1: Transmittal of Entire Record Under Review of the Bible Temple case totalling 128 pages;

(b) Exhibit 2: Consolidated:
Copies of the Petitioner's Brief and Abstract of Record and the Respondent's Brief and Supplemental Abstract of Record;

(c) Exhibit 3: Transcript of the Bible Temple hearing held June 15 and 16, 1987, consisting of a cover sheet and 242 pages;

(d) Exhibit 4: Consolidated: Copies of the 11 exhibits from the Bible Temple hearing, June 15 and 16, 1987;

(e) Exhibit 5: Referee Decision Case No. 89-T-0153A Westgate Baptist Church;

(f) Exhibit 6: Employment Division Hearing Memorandum in Westgate Baptist Church;

(g) Exhibit 7: Department of Justice letter dated May 25, 1989;

(h) Exhibit 8: Department of Justice Opinion, OP-5827;

(i) Exhibit 9: Letter dated September 5, 1990, to the Bible Temple parties

Legal Issue: Whether the applicant is an employer under Employment Division Law as defined by ORS 657.025.

Referee's Findings of Fact: The findings of fact as set out in Referee Decision Case No. 86-T-106 are adopted and made a part of this decision.

Conclusion and Reasons: ORS 657.025 defines an "employer" as: "any employing unit which employs one or more individuals in an employment subject to this chapter in each of 18 separate weeks during any calendar year, or in which its total payroll during any calendar quarter amounts to $225 or more."

The application met these requirements during the second quarter of 1985. Therefore, the applicant is an "employer" within the meaning of the Employment Division Law unless the services performed on its behalf are exempt under one of the exclusionary provisions of Employment Division Law.

In the initial hearing, the applicants argued, and were successful in establishing, that the services fell under the exclusion of ORS 657.072(1)(a)(A). " 'Employment' does not include service performed: (a) in the employ of: (A) A church or convention or association of churches * * * ." The applicants at the August 21, 1990, hearing argued the same point. They also use other arguments with the basis for those arguments being the exclusion established under ORS 657.072(1)(a)(A).

The Oregon Supreme Court in *Rogue Valley* ruled that provision of the Oregon Employment Division Law violated the Oregon Constitution, Article I, Section 3.

At the August 21, 1990, hearing, the applicants argued that *Rogue Valley* is no longer valid as the U.S. Supreme Court's decision in *Employment Division v. Smith,* 110 S.Ct. 1595, 108 L.Ed.2d 876, (1990) effectively overruled it. They argued that *Smith* stated the only way to exclude coverage from Unemployment Compensation benefits was to do so by statute. The statute, ORS 657.072(1)(a), was passed, and the court should have honored it.

Smith does not affect the *Rogue Valley* decision. *Smith* dealt with a separation from employment and was not a tax assessment case. In *Smith,* an individual was discharged for violating an employer's rule against the use of prohibited substances while in their employ. The use of

the prohibitive substance also violated Oregon's criminal statutes. The claimant argued in *Smith* that the use of the prohibited substance was part of his religion. The court in *Smith* indicated that The Free Exercise of Religion Clause of the First Amendment did not extend to protect this type of action. Therefore, since the action did violate the criminal statute, it was not error to hold that the act constituted misconduct under Employment Division Law.

It was mentioned in *Smith* that the legislature could have made an exemption from the criminal statute for this type of use of the prohibited substance. It was not stated that if such an exemption was made it would be automatically accepted. The act still must be constitutionally valid.

The Oregon Supreme Court in *Rogue Valley* was testing the validity of ORS 657.072(1) against the Oregon Constitution and found it wanting. The court had the authority to take that action and when it exercised that authority, the referee is bound by its ruling. Thus ORS 657.072(1)(a) is no longer valid as a basis for establishing an exclusion from Employment Division Law. Those arguments advanced on behalf of the applicant using that provision as a basis for its arguments are rejected.

The applicant and the applicants at the August 21, 1990, hearing also argued that subjecting them to Employment Division Law will entangle the state in their religion. This entanglement is a result of the questions which Employment Division representatives may ask of the applicants. These questions would arise in contested cases dealing with separations and relate to the teachings or doctrines of the applicants and how these teachings or doctrines

affected the separated individual's eligibility for unemployment insurance benefits. The applicant argues that such actions violate the First Amendment to the U.S. Constitution.

The applicant specifically argued these actions violate the Establishment Clause of the First Amendment. This seems more of a Free Exercise of Religion question.

To support this argument, attention has been called to the testimony in Bible Temple indicating that any action taken by personnel of the church is seen as being religious in nature as it deals with their ministry and how they were called to do God's work. The applicant argues that to challenge the church's view of these actions is to be directly entangled with the affairs of the church. These inquiries are viewed as a challenge to the wall which should exist between church and state. In light of *Salem College* and Rogue Valley, the Supreme Court of Oregon views that such inquiries do not invade, to that great a degree, a church's territory.

The court in *Salem College* specifically spoke to the point the applicant made here. It noted that the applicant in *Salem College* was concerned that it could not maintain the doctrinal standards required of its employees and doctrine and faith to Employment Division scrutiny in protracted and expensive contests over unemployment benefits administrative determinations that will "entangle" the state in religion. The court pointed out "(T)his eventually can adequately be dealt with if and when it happens; we have no reason to believe that discharges of school employees over matters of religious doctrine are so frequent as to require the employer's entire exemption

from the unemployment compensation system on that account."

This is still the case. Neither the applicant here nor the applicants at the August 21, 1990, hearing have established that a problem has occurred in this area. In isolated instances, such problems may occur in the future in either a benefit or tax case. As the court stated, these problems could then be addressed.

The applicant also pointed out that to involve it in Employment Division Law matters would force it to be involved in a program which it deems ungodly. The applicant cannot operate as if it is on an island. It is doing business in the State of Oregon and must comply with the laws affecting the type of business it is doing. This may take it out of the religious realm and place it in the secular area. That will happen and the applicant will have to deal with it. This is not seen as infringing on the applicant's free exercise of its religion.

Neither is the applicant being asked to support the government. What it is being required to do is insure its former employees have economic sustenance when, and if, they became unemployed through no fault of that employee. In *Rogue Valley,* this was recognized as one of several overriding government interests in this area. Additionally, it is noted that the applicant is not being asked to pay a general tax, but merely reimburse the state for the amounts paid out to its former employees who did qualify for such benefits.

The applicant has failed to establish that including it under Employment Division Law violates Amendment I to the U.S. Constitution or the Oregon Constitution.

The applicant also argues that the services performed by some ministers involved in religious schools may be excluded because they are ordained, while others who are involved and not ordained would be covered. This would be unfair and violate the Equal Protection Clause of the U.S. Constitution. *Salem College* and *Rogue Valley* do not support such an argument. *Salem College* indicated that all employees of all religious schools, whether controlled by churches or not, were to be covered for unemployment compensation purposes. Any question as to the intent of *Salem College* was removed by the decision in *Rogue Valley*. *Rogue Valley* did not restrict, but broadened, the coverage of Employment Division Law. While a question may have existed as to the coverage of employees of churches after *Salem College*, there should be no question that all services performed for religious schools by any individual would be covered by Employment Division Law.

The initial referee decision in this case raises a question as to whether school employees are really distinguishable from church employees. The applicant argues that it is not possible to do so when the school is an "integral and inseparable arm" of the church. This is not a problem. Individuals were hired to meet the staff requirements of the applicant's school. It was established that the applicant has certain administrators dedicated to support its school activities. Therefore, those individuals performing work for the applicant's school can be specifically identified and, without a heavy burden, the amounts paid for these services readily established. Thus, these employees, while employed by a church, are really school employees.

In light of the dictates of *Salem College*, the services performed by these individuals must be covered by Employment Division Law.

The applicant also argues that each exclusion set out in ORS Chapter 657 establishes a protected class out of a bigger class. Thus, all of the exclusions are violations of the Constitution. The court only ruled on the exclusion established for employees of churches and religious organizations and, in this matter, we are only concerned with those individuals involved in working in the religious or church schools. The court did not go beyond that point. This referee has authority to only rule on the question before him.

The applicant's final argument centers around the date its coverage under Employment Division Law should start. It is pointed out that the Employment Division divided church employees into those employed in religious or church schools and those which were not involved in the schools. Those involved in educational work were to be covered as of April 26, 1985. Other church employees were not to be covered until July 1, 1989. These dates corresponded to the *Salem College* and *Rogue Valley* decisions.

As stated above, groups are distinguishable. There exists a reason for the different dates as to the court was very specific in establishing all school employees would be covered under the *Salem College* case. However, it was not established that the coverage extended to other employees of churches or religious organizations until the decision in *Rogue Valley*. The argument that one had to put all church employees into one category if the

schools were an "integral and inseparable arm" of the church is not supported as set out above. One other effect is to deny the school employees their opportunity for unemployment insurance coverage after being given that opportunity in *Salem College*.

In light of *Rogue Valley*, a strong argument could be made to have all church employees covered as of April 26, 1985. The Employment Division determined not to administer the law in that manner. Noting the dates of the two decisions and what these decisions state, the Employment Division has not acted in an arbitrary manner. The services performed by the applicant's school employees are subject to being covered as of April 26, 1985.

DECISION

The Notice of Determination issued to the applicant is affirmed. The applicant is an employer subject to Employment Division Law as of April 26, 1985, and is to be treated as a reimbursing employer from that date. This pertains to the services performed by its school employees.

/s/ R.H. Heinichen
R.H. HEINICHEN
Referee

rhh/sls

NOTICE: The foregoing is a final order or a decision of the referee. It is subject to the right of an aggrieved party to file a petition within 20 days with the Court of Appeals, State of Oregon, for judicial review under the

Administrative Procedure Act. *See* ORS 657.684 and ORS Chapter 183 (183.310 to 183.500).

In the event this decision is appealed to the Oregon Court of Appeals, a copy of petition should be mailed to *H. Scipio, Hearings Section, Employment Division, 875 Union NE. Salem, Oregon 97311,* as a means of expediting the preparation of the transcript.

Date Mailed: 10-16-90

Employment Division
Hearings Section
875 Union Street NE
Salem, OR 97311

Final Appeal Date: 11-05-90

REFEREE DECISION

FIRST BAPTIST CHURCH OF SCAPPOOSE
CASE NO. 86-T-0131
FIRM NO. 361783

SOUTH LAKE CHRISTIAN CENTER
CASE NO. 86-T-0103
FIRM NO. 361836

CHRISTIAN ASSEMBLY CHURCH
CASE NO. 86-T-0079
FIRM NO. 361789

HOOD RIVER BIBLE FELLOWSHIP
CASE NO. 86-T-0107
FIRM NO. 363480

OPEN DOOR BAPTIST CHURCH
CASE NO. 86-T-0110
FIRM NO. 362086

GARDEN WAY CHURCH
CASE NO. 86-T-0109
FIRM NO. 361831

FAITH CHRISTIAN FELLOWSHIP
CASE NO. 86-T-0095
FIRM NO. 363490

COUNTRY CHURCH SCHOOL
CASE NO. 86-T-0152
FIRM NO. 362179

COMMUNITY BIBLE CHURCH
CASE NO. 86-T-0100
FIRM NO. 361521

ASSEMBLY OF GOD
CASE NO. 86-T-0102
FIRM NO. 361805

CHRIST'S CENTER CHURCH
CASE NO. 86-T-0080
FIRM NO. 556083

TILLAMOOK CHRISTIAN SCHOOL
CASE NO. 86-T-0159
FIRM NO. 363506

PENDLETON BAPTIST CHURCH
CASE NO. 86-T-0096
FIRM NO. 363512

MCMINVILLE [sic] CHRISTIAN SCHOOL
CASE NO. 86-T-0151
FIRM NO. 363519

BAPTIST CHRISTIAN SCHOOL
CASE NO. 86-T-0172
FIRM NO. 363477

INTERFAITH CHRISTIAN CENTER
CASE NO. 86-T-0148
FIRM NO. 363510

FIRST ASSEMBLY OF GOD
CASE NO. 86-T-0130
FIRM NO. 361811

CROSSROADS CHURCH OF CHRIST
CASE NO. 86-T-0108
FIRM NO. 362446

NEWBURB [sic] OPEN BIBLE SCHOOL
CASE NO. 86-T-0150
FIRM NO. 363521

BAKER VALLEY CHRISTIAN ASSEMBLY
CASE NO. 86-T-0094
FIRM NO. 363464

NEW LIFE CHRISTIAN ACADEMY
CASE NO. 87-T-0163
FIRM NO. 385881

Notices of Determination were issued to the above named applicants. The Notices of Determination established that the applicants were employers subject to Employment Division Law as of April 26, 1985. All of the applicants either filed timely requests for a hearing or good cause was established for their late requests for a hearing.

The applicants agreed to wait until the Bible Temple case was heard before action was taken on their cases. A referee decision was issued in the Bible Temple case on November 25, 1987. The referee ruled that Bible Temple was not an employer subject to Employment Division Law under provisions of ORS 657.072(1)(a). The referee decision was appealed to the Court of Appeals. On May 2, 1990, the Oregon Court of Appeals reversed and remanded the Bible Temple case for reconsideration in light of *Employment Division v. Rogue Valley Youth for*

Christ, 307 Or 490, 770 P2d 588 (1989). It was then decided to go forward with these cases.

Prior to the date of the hearing, McMinnville Christian School, Firm Number 363519, operated by the McMinnville First Church of the Nazarene closed its school and requested that its appeal be withdrawn. That request will be allowed.

A consolidated hearing was conducted on August 21, 1990 at the Portland Hearings Office. These matters were consolidated under OAR 471-40-015(5) as the issues were the same and it would neither unduly complicate these issues nor jeopardize the rights of the parties. All of the applicants were represented by Charles E. Craze, attorney and Kelly Clark, attorney. M. Harbur, Assistant Attorney General represented the Employment Division.

No direct testimony was taken, but a number of facts were stipulated to and agreed upon at the hearing. It was also agreed that the referee would review the entire file of the Bible Temple case and make part of the record for this matter all of the testimony, arguments and briefs submitted concerning the Bible Temple case.

The following items pertaining to the Bible Temple case, which were not available at the time of the August 21, 1990 hearing, were received and by this notice made part of the record by the referee: a) Marked as consolidated Exhibit 14 – Petitioner's Brief and Abstract of Record dated December 7, 1989 and Respondent's Brief and Supplemental Abstract of Record; b) Marked as Exhibit 15 – a copy of the transcript from the Bible Temple Hearing held June 15 and 16, 1987, consisting of a cover sheet and 242 pages; c) Marked as consolidated Exhibit 16 – copies of the 11 exhibits from the June 15 and 16, 1987 hearing.

The referee also takes official notice of the documents in the various files concerning the applicants which were forwarded by the Employment Division. Any objections to these exhibits or the referee taking notice of the documents in the various files must be made in writing to the referee within 10 days of the date this decision is issued.

Issue and Law: Whether the apllicants [sic] are employers under Employment Division Law as defined by ORS 657.025.

Findings of Facts: The following findings of facts were agreed to by the parties.

(1) Each of the applicants is a church and is incorporated as a non-profit, religious corporation under the laws of the State of Oregon. (2) Each of the applicants has received recognition of tax exempt status under Section 501(c)(3) of the United States Internal Revenue Code and is exempt from income tax under Section 501(1) of the U.S. Internal Revenue Code. (3) Each of the applicants has stated in its articles of incorporation a religious or several religious purposes. (4) Each of the applicants has, among its ministries, a school. (5) Each school ministry was started as a part of and has remained a part of the applicants' church. (6) None of the schools operated by the applicants are separately incorporated and none have separate governments or administrations apart from their parent churches. (7) The leadership of each of the applicants is also the governing body of the applicant and its school. (8) All assets and property used by the schools are owned by the respective churches and are managed and controlled by the governing bodies of the churches. (9)

Each of the schools has no separate payroll, no recognizable or identifiable membership and no legal existence apart from that of the applicants. (10) Each of the applicants has staff working in their other ministries as well as staff working in their schools. (11) Each of the applicants considers itself to be a Christian espoused religion with Biblical emphasis in all of its teachings. (12) Although staff members of each of the applicants' schools are hired in the usual manner for educational employees, each of the staff members must have a "proven relationship with the Lord". (13) Each of the staff members of the applicants' schools is expected to be of the applicants' faith and to live up to Christian standards 24 hours a day. The staff members are informed either in writing or verbally of these requirements when hired. (14) None of the applicants have sought, nor would they accept funds from the State of Oregon or any other governmental agency for the operation of their schools. (15) The primary purpose of each school is to have a religious impact on the student and to train the individual to see life from God's perspective. (16) Attendance at each of the applicants' schools is accepted by the State of Oregon in fulfillment of compulsory attendance laws.

The following finding of facts are based on the documents made part of the record.

(17) The applicants filed timely elections for reimbursing employer status which would be effective as of April 26, 1985. (18) Each of the applicants had a school in operation in 1985 and had staff performing services in these

schools. (19) Remuneration was paid to the staff performing these duties in each of these schools. (20) This remuneration totaled more than $225 per calendar quarter as of the second calendar quarter of 1985.

The following findings of fact are based on the documents from the files made available to the referee from the Employment Division:

(21) The Tillamook Christian School, Firm Number 363506, is operated by the Tillamook Christian Center; Baptist Christian School, Firm Number 363477, is operated by the First Babtist [sic] Church, Hood River; Country Church School, Firm Number 362179, is operated by the Country Church; Newberg Open Bible School, Firm Number 363521, is operated by the Newberg Open Bible Church; New Life Christian Academy, Firm Number 385881, is operated by New Life Center.

Conclusions and Reasons: The applicants are either identified as churches or schools. Those identified as schools do not have legal or real identities separate from their parent churches. Thus, all of the applicants are either schools which are in reality part of their parent churches, or are churches, which have as one of their integral parts, a school. This is why the applicants are viewed as churches, even if they are identified, in some cases, as schools.

The applicants agreed at the hearing that the basic facts concerning Bible Temple were also met by each of the applicants in this matter. The evidence from the Bible Temple case established that Bible Temple had personnel performing services for its school and earning sufficient remuneration as a result of those services to meet the

requirements of being an employer under provisions of ORS 657.025 as of the second calendar quarter of 1985. Therefore, since the applicants were in the same situation as Bible Temple, they too would have personnel performing services for their schools and earning sufficient remuneration from these services to meet the requirements of being an employer under ORS 657.025. This would be so unless the services performed by these individuals employed by the applicants were subject to one of the exclusionary provisions of ORS Chapter 657 or the applicants are exempt from Employment Division Law coverage under some other law.

The applicants offer that they should be excluded under provisions of ORS 657.072(1)(a)(A) as they are churches and employment by a church is not to be covered by Employment Division Law. They also make other arguments using ORS 657.072(1)(a) as a basis for exclusion from coverage under Oregon Employment Division Law. The Oregon Supreme Court in *Rogue Valley* ruled that provision of the Oregon Employment Division Law violated the Oregon Constitution, Article I, Section 3.

The applicants argued at the August 21, 1990 hearing that *Rogue Valley* is no longer valid, as the U. S. Supreme Court's decision in *Employment Division v. Smith,* 110 S.Ct. 1595, 108 L.Ed.2d 876, (1990) effectively overruled it. The applicants argue *Smith* stated that the only way to exclude coverage from Unemployment Compensation benefits was to do so by statute. The statute, ORS 657.072(1)(a), was passed, and the court should have honored it.

Smith, does not affect the *Rogue Valley* decision. The question addressed in *Smith* is not the same one addressed in *Rogue Valley. Smith* dealt with a separation from employment and was not a tax assessment case. In *Smith,* an individual was discharged for violating an employer's rule against the use of prohibited substances while in their employ. The use of the prohibitive substance also violated Oregon's criminal statutes. The claimant argued in *Smith* that the use of the prohibited substance was part of his religion. The court in *Smith* indicated that the Free Exercise of Religion Clause of the First Amendment did not extend to protect this type of action. Therefore, since the action did violate criminal statutes, it was not error to hold that the act constituted misconduct under Employment Division Law.

In passing it was mentioned in *Smith* that the legislature could have passed an exemption from the criminal statute for this type of use of the prohibited substance. It was not stated that if such an exemption was made it would be automatically accepted. The act still must be constitutionally valid.

The Oregon Supreme Court in *Rogue Valley* was testing the validity of ORS 657.072(1) against the Oregon Constitution and found it wanting. The court had the authority to take that action and when it exercised that authority, the referee is bound by its ruling. Thus ORS 657.072(1)(a) is no longer valid as a basis for establishing an exclusion from Employment Divsion [sic] Law. Those arguments advanced by the applicants using that provision as a basis for their arguments are rejected.

The applicants also argue that subjecting them to Employment Division Law will entangle the state in their religion. This entanglement is a result of the questions which Employment division representatives may ask of the applicants. These questions would arise in contested cases dealing with separations and relate to the teachings or doctrines of the applicants and how these teachings or doctrines affected the separated individual's eligibility for unemployment insurance benefits. The applicants argue that such actions violate the First Amendment to the U. S. Constitution.

The applicants specifically argue that such acts violate the Establishment Clause of the First Amendment. This seems more of a Free Exercise of Religion question.

To support its argument, the applicants point to testimony in Bible Temple indicating that any action taken by personnel of the church is seen as being religious in nature as it deals with their ministry and how they were called to do God's work. To challenge the church's view of these actions is to be directly entangled with the affairs of the church. These inquiries are viewed as a challenge to the wall which should exist between church and state. The evidence and views are accepted as being the same for the applicants in this matter. In light of *Salem College* and *Rogue Valley,* the Supreme Court of Oregon views that such inquiries do not invade, to that great a degree, church's territory.

The court in *Salem College* specifically spoke to the point the applicants make. It noted that the applicant in *Salem College* was concerned that it could not maintain the

doctrinal standards required of its employees and discharge an employee for failing to meet those standards without opening its doctrine and faith to Employment Division scrutiny in protracted and expensive contests over unemployment benefits administrative determinations that will "entangle" the state in religion. The court pointed out "(T)his eventually can adequately be dealt with if and when it happens; we have no reason to believe that discharges of school employees over matters of religious doctrine are so frequent as to require the employer's entire exemption from the unemployment compensation system on that account."

This is still the case. The applicants have not established that a problem has occurred in this area. In isolated instances such problems may occur in the future in either a benefit or tax case. As the court stated, these problems could then be addressed.

The applicants also pointed out that to involve them in Employment Division Law matters would force them to be involved in a program which it deems ungodly. The applicants cannot operate as if they are on an island. They are doing business in the State of Oregon and must comply with the laws affecting the type of business they are doing. This may take them out of the religious realm and place them in the secular area. That will happen and the applicants will have to deal with it. This is not seen as infringing on the applicants' free exercise of their religion.

Neither are the applicants being asked to support the government. What they are being required to do is insure their former employees have economic sustenance when,

and, if they became unemployed though no fault of that employee. In *Rogue Valley,* this was recognized as one of several overriding government interests in this area. Additionally, it is noted that they are not being asked to pay a general tax, but merely reimburse the state for the amounts paid out to their former employees who did qualify for such benefits.

The applicants have failed to establish that including them under Employment Division Law violates Amendment I to the U. S. Constitution or the Oregon Constitution.

The applicants also argue that the services performed by some ministers involved in religious schools may be excluded because they are ordained, while others who are involved and not ordained would be covered. This would be unfair and violate the Equal Protection Clause of the U. S. Constitution. *Salem College* and *Rogue Valley* do not support such a [sic] argument. *Salem College* indicated that all employees of all religious schools, whether controlled by churches or not were to be covered for unemployment compensation purposes. Any question as to the intent of *Salem College* was removed by the decision in *Rogue Valley. Rogue Valley* did not restrict but broadened the coverage of Employment Division Law. While a question may have existed as to the coverage of employees of churches after *Salem College,* there should be no question that all services performed for religious schools by any individual would be covered by Employment Division Law.

The initial referee decision in the Bible Temple case raises a question as to whether school employees are really

distinguishable from church employees. The applicants argue that it is not possible to do so when the school is an "integral and inseparable arm" of the church. This is not viewed as being a problem. The applicants agree that individuals are hired to meet the staff requirements of the schools. The testimony from Bible Temple established that these applicants have certain administrators dedicated to support their school activities. Therefore, those individuals performing work for the applicants' schools can be specifically identified and, without a heavy burden, the amounts paid for these services readily established. Thus, these employees, while employed by a church, are really school employees. In light of the dictates of *Salem College*, the services performed by these individuals must be covered by Employment Division Law.

The applicant also argue that each exemption set out in ORS Chapter 657 establishes a protected class out of a bigger class. Thus, all of the exemptions are violations of the Constitution. The court only ruled on the exemption established for employees of churches and religious organizations and, in this matter, we are only concerned with those individuals involved in working in the religious or church schools. The court did not go beyond that point. This referee has authority to only rule on the question before him.

The applicants' final argument centers around the date their coverage under Employment Division Law should start. It is pointed out that the Employment Division divided church employees into those employed in religious or church schools and those that were employed directly in church work and not involved in the schools.

Those involved in educational work were to be covered as of April 26, 1985. Other church employees were not to be covered until July 1, 1989. These dates corresponded to the *Salem College* and *Rogue Valley* decisions.

As stated above, the groups are distinguishable. There exists a reason for the different dates as the court was very specific in establishing all schools employees would be covered under the *Salem College* case but it could be interpreted that the coverage did not extend to other employees of churches or religious organizations until the decision in *Rogue Valley*. The argument that one had to put all church employees into one category if the schools were an "integral and inseparable arm" of the church is not supported as set [sic] above. One other effect is to deny the school employees their opportunity for unemployment insurance coverage after being given that opportunity in *Salem College*.

In light of *Rogue Valley*, a strong argument could be made for having all church employees be covered from April 26, 1985. The Employment Division determined not to administer the law in that manner. Noting the dates of the two decisions and what these decisions stated, the Employment Division has not acted in an arbitrary manner. The services performed by the applicants' school employees are subject to being covered as of April 26, 1985.

DECISION

(A) The request for hearing filed by the McMinnville Christian School, Firm Number 363519, operated by the

McMinnville First Church of the Nazarene was withdrawn, and therefore, its request for hearing is dismissed.

(B) The Notices of Determinations issued to the other applicants are affirmed. They are employers subject to Employment Division Law as of April 26, 1985 and are to be treated as reimbursing employers from that date. This pertains to the services performed by their school employees.

/s/ R. H. Heinichen
R. H. HEINICHEN
Referee

rhh

NOTICE: The foregoing is a final order or a decision of the referee. It is subject to the right of an aggrieved party to file a petition within 20 days with the Court of Appeals, State of Oregon, for judicial review under the Administrative Procedure Act. *See* ORS 657.684 and ORS Chapter 183 (183.310 to 183.500).

In the event this decision is appealed to the Oregon Court of Appeals, a copy of petition should be mailed to *H. Scipio, Hearings Section, Employment Division, 875 Union NE, Salem, Oregon 97311,* as a means of expediting the preparation of the transcript.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of a Notice of Determination of Bible Temple.	Agency No. 86-T-01068
BIBLE TEMPLE, Petitioner, v. EMPLOYMENT DIVISION, Respondent,	CA A67126 (Control)
In the Matter of Notices of Determination of First Baptist Church of Scappoose, South Lake Christian Center, Christian Assembly Church, Hood River Bible Fellowship, Open Door Baptist Church, Garden Way Church, Faith Christian Fellowship, Country Church School, Community Bible Church, Assembly of God, Christ's Center Church, Tillamook Christian School, Pendleton Baptist Church, Baptist Christian School, Interfaith Christian Center, First Assembly of God, Crossroads Church of Christ, Newberg Open Bible School, Baker Valley Christian Assembly and New Life Christian Academy.	Agency Nos. 86-T-0131 86-T-0103 86-T0079, 86-T-0107, 86-T-0110 86-T-0109, 86-T-0095, 86-T-0152, 86-T-0100, 86-T-0102, 86-T-0080, 86-T-0159, 86-T-0096, 86-T-172, 86-T-0148, 86-T-0130, 86-T-0108, 86-T-0108, 86-T-0150, 86-T-0094
	CA A 67130
	ORDER CONSOLIDATING

FIRST BAPTIST CHURCH OF SCAPPOOSE, SOUTH LAKE CHRISTIAN CENTER, CHRISTIAN ASSEMBLY CHURCH, HOOD RIVER BIBLE FELLOWSHIP, OPEN DOOR BAPTIST CHURCH, GARDEN WAY CHURCH, FAITH CHRISTIAN FELLOWSHIP, COUNTRY CHURCH SCHOOL, COMMUNITY BIBLE CHURCH, ASSEMBLY OF GOD, CHRIST'S CENTER CHURCH, TILLAMOOK CHRISTIAN SCHOOL, PENDLETON BAPTIST CHURCH, BAPTIST CHRISTIAN SCHOOL, INTERFAITH CHRISTIAN CENTER, FIRST ASSEMBLY OF GOD, CROSSROADS CHURCH OF CHRIST, NEWBERG OPEN BIBLE SCHOOL, BAKER VALLEY CHRISTIAN ASSEMBLY and NEW LIFE CHRISTIAN ACADEMY,

Petitioners,

v.

EMPLOYMENT DIVISION,

Respondent.

Petitioners have moved for an order consolidating the above petitions for judicial review. The motion is allowed. The title of the case is amended as set forth in the caption of this order.

Petitioners' brief is due March 5, 1991.

/s/ George M. Joseph
CHIEF JUDGE

JAN 29 1991
DATE

c: Kelly Ford
Charles E. Craze
Charlotte A. Cover
Virginia L. Linder

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE ST., SALEM, OR 97310

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of a Notice of Determination of Bible Temple.	Agency No. 86-T-01068
BIBLE TEMPLE, Petitioner,	CA A67126 (Control)
v.	Agency Nos. 86-T-0110
EMPLOYMENT DIVISION, Respondent,	86-T0109, 86-T-0152, 86-T-0100,
In the Matter of Notices of Determination of First Baptist Church of Scappoose, South Lake Christian Center, Christian Assembly Church, Hood River Bible Fellowship, Open Door Baptist Church, Garden Way Church, Faith Christian Fellowship, Country Church School, Community Bible Church, Assembly of God, Christ's Center Church, Tillamook Christian School, Pendleton Baptist Church, Baptist Christian School, Interfaith Christian Center, First Assembly of God, Crossroads Church of Christ, Newberg Open Bible School, Baker Valley Christian Assembly and New Life Christian Academy.	86-T-0102, 86-T-0080, 86-T-0159, 86-T-0148, 86-T-0130, 86-T-0108, 86-T-0150, 86-T-0094, CA A67130 ORDER DISMISSING SEVERAL PETITIONERS

OPEN DOOR BAPTIST CHURCH, GARDEN WAY CHURCH, COUNTRY CHURCH SCHOOL, COMMUNITY BIBLE CHURCH, ASSEMBLY OF GOD, CHRIST'S CENTER CHURCH, TILLAMOOK CHRISTIAN SCHOOL, INTERFAITH CHRISTIAN CENTER, FIRST ASSEMBLY OF GOD, CROSSROADS CHURCH OF CHRIST, NEWBERG OPEN BIBLE SCHOOL, BAKER VALLEY CHRISTIAN ASSEMBLY and NEW LIFE CHRISTIAN ACADEMY,

Petitioners,

v.

EMPLOYMENT DIVISION,

Respondent.

Petitioners, First Baptist Church of Scappoose, South Lane Christian Center, Christian Assembly, Hood River Bible Fellowship, Faith Christian Fellowship, Pendleton Baptist Church, and First Baptist Church of Hood River, operating as Baptist Christian School, have moved to be dismissed from the above petition for judicial review. The motion is allowed. The title of the case is amended as set forth in the caption of this order.

Attorney for Petitioners, Kelly Ford, has also moved for an extension of time to file the opening brief in the

above case. The motion is allowed. Petitioners' brief is due April 2, 1991.

/s/ George M. Joseph
CHIEF JUDGE

MAR 05 1991
DATE

INDUSTRIAL AND LABOR RELATIONS
Unemployment Insurance

657.030 Employment generally; educational, hospital, nursing, student service exclusions.

* * *

(2) Notwithstanding any other provisions of this chapter, "employment" shall include service:

(a) Which is subject to the tax imposed by the Federal Unemployment Tax Act; or

(b) Which is required to be covered under this chapter as a condition for employers to receive a full tax credit against the tax imposed by the Federal Unemployment Tax Act.

* * *

657.176 Grounds and procedure for disqualification. (1) An authorized representative designated by the assistant director shall promptly examine each claim to determine whether an individual is subject to disqualification as a result of a separation, termination, leaving, resignation, or disciplinary suspension from work or as a result of failure to apply for or accept work and shall promptly enter an assistant director's decision if required by ORS 657.265(4).

(2) An individual shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to this chapter, or for an employing unit in this or any other state or Canada or as an employe of the Federal Government, for which remuneration is received which equals or exceeds four times

the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred, if the authorized representative designated by the assistant director finds that the individual:

(a) Has been discharged for misconduct connected with work, or

(b) Has been suspended from work for misconduct connected with work, or

(c) Voluntarily left work without good cause, or

(d) Failed without good cause to apply for available suitable work when referred by the employment office or the assistant director, or

(e) Failed without good cause to accept suitable work when offered.

657.471 Manner of charging benefits to employer. (1) Subject to the provisions of subsections (2) to (7) and (10) of this section, benefits paid to an eligible individual shall be charged to each of the individual's employers during the base year in the same proportion that the wages paid by each employer to the individual during the base year bear to the wages paid by all employers to that individual during that year.

* * *

(7) If a base-year employer, not otherwise eligible for relief of charges for benefits under this section, receives notification of an initial valid determination of a claim filed by an individual who:

(a) Left work of such employer voluntarily and not attributable to the employer, such employer may request

relief of charges within 20 days after the mailing of such notice thereof to the employer's last address as shown by the records of the assistant director. The request must advise the assistant director in writing the date of such leaving and that such leaving was voluntary and not attributable to the employer and the reason therefor. Upon receipt of such notice from the employer the assistant director shall investigate the separation and if the resulting determination, which shall be made by the assistant director, establishes that the leaving was voluntary and not attributable to the employer, that employer's account shall not be charged with benefits during that individual's benefit year. If the individual was reemployed by such employer prior to the filing of the initial valid claim, the employer shall not receive relief of the employer's account under this subsection; or

(b) Was disqualified for the individual's most recent separation from such employer by an assistant director's decision which found the individual has been discharged for misconduct connected with the work, that employer may request relief of charges within 20 days after the mailing of such notice thereof to the employer's last address as shown by the records of the assistant director. Upon receipt of such request from the employer, the assistant director shall examine division records and if the requirements of this subjection have been met shall grant the relief of charges to that employer for benefits paid to the individual during the benefit year.

657.663. Penalty for failure by employer to file reports; amount; collection procedure; review of penalty. (1) If an employer fails to file a required quarterly tax report or quarterly detail of employes' wages and weeks

of work by the 10th day of the second month following the end of the calendar quarter, the assistant director, for the first such failure, shall send to the employer at the employer's last-known address a written notice warning the employer that a subsequent failure to file a required report could result in the imposition of a late filing penalty. If an employer, without good cause, fails to file a required report within the three-year period immediately following a written warning, the employer may be assessed a late filing penalty in addition to other amounts due. The penalty shall be .0002 of the taxable wage base in effect for the year against which the penalty is being assessed for each employe listed each quarter on the late filed reports. However, the minimum penalty for any calendar quarter shall not be less than .0025 nor the maximum penalty more than .05 of the taxable wage base in effect for the year.

657.530 Lien on property used in connection with employment on which contributions are due. The assistant director also shall have a lien upon all real or personal property of the employer used in connection with the employment on which contributions are due, in a sum equal to the amount at any time due from any employer subject to this chapter on account of labor performed by the workmen of such employer, together with interest and penalty.

657.660 Records and reports of employing units. (1) Every employing unit shall keep true and accurate records of all persons employed by it and such records of hours worked, wages paid and other statistics as prescribed by the assistant director for the administration of this chapter.

(2) Such records shall be open to inspection by the assistant director or an authorized representative of the assistant director at any reasonable time. No person shall refuse to allow the assistant director authorized representative to inspect the payroll or other records or documents relative to the enforcement of this chapter.

(3) The assistant director may require from any employing unit such reports on the wages, hours, employment, unemployment and related matters concerning its employes as the assistant director deems necessary to the effective administration of this chapter.

(4) Every employing unit shall fully, correctly and promptly furnish the assistant director all information required by the assistant director to carry out the purposes and provisions of this chapter.

INDUSTRIAL AND LABOR RELATIONS
Unemployment insurance
(1990 Supplement)

657.072 Employment; certain nonprofit services excluded

(1) "Employment" does not include service performed:

(a) In the employ of:

(A) A church or convention or association of churches;

(B) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) By a duly ordained, commissioned or licensed minister of a church in the exercise of ministry or a member of a religious order in the exercise of duties required by such order; or

(c) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market when such service is performed by an individual receiving such rehabilitation or remunerative work.

(2) Provisions of subsection (1) of this section apply only to services performed for a nonprofit employing

unit. A "nonprofit employing unit" means an organization, or group of organizations, described in section 501 (c)(3) of the U.S. Internal Revenue Code which is exempt from income tax under section 501 (1) of the U.S. Internal Revenue Code.

[1971 c.463 § 4; 1973 c.118 § 1; 1977 c.446 § 4. Note: Sections 4 to 6, chapter 897, Oregon Laws 1989, provide:

Sec. 4. ORS 657.072 is repealed and section 5 of this Act is enacted in lieu thereof.

Sec. 5. (1) "Employment" does not include service performed:

(a) In the employ of:

(A) A church or convention or association of churches; or

(B) An organization which is operated primarily for religious purposes, whether or not the organization is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) By a duly ordained, commissioned or licensed minister of a church in the exercise of ministry or a member of a religious order in the exercise of duties required by such order; or

(c) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market when such service is

performed by an individual receiving such rehabilitation or remunerative work.

(2) Provisions of subsection (1) of this section apply only to services performed for a nonprofit employing unit. A "nonprofit employing unit" means an organization, or group of organizations, described in section 501(c)(3) of the U.S. Internal Revenue Code which is exempt from income tax under section 501(a) of the U.S. Internal Revenue Code. (1989 c.897 §5)

Sec. 6. Sections 4 and 5 of this Act do not become operative until amendments to the Federal Unemployment Tax Act (26 U.S.C. §3301 et seq.) become operative that permit states to exempt all religious organizations without jeopardizing the right of employers in this state to a full tax credit against the tax imposed by the Federal Unemployment Tax Act. (1989 c.897 §6)]